No. 70-805

In the Supreme Court of the United States

OCTOBER TERM, 1971

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

FIRST SECURITY BANK OF UTAH, ET AL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW AND JURISDICTION

The opinions below and the basis for this Court's jurisdiction are as set forth in the petition.

QUESTION PRESENTED

Where national banks, prohibited by national banking laws from receiving insurance income or engaging in the insurance business, made available to their borrowers credit life, accident and health insurance written by an unrelated insurer, which in turn ceded the risks and premiums to a life insurance company related to the banks, did the Court of Appeals correctly hold under the particular facts of this case that it was improper for the Commissioner to attempt to allocate almost one-half of the premium income to the banks under Sections 61 and 482 of the Internal Revenue Code?

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are set forth in the petition at p. 2, and App. D 53-57.

STATEMENT

This is a consolidated income tax case for the years 1954 through 1959, primarily involving Section 482 of the Internal Revenue Code of 1954.[1] Section 482 empowers the Commissioner of Internal Revenue to allocate income among business enterprises controlled by the same interests "if he determines that such * * * allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income of any such * * * businesses."

Respondent banks, First Security Bank of Utah, N.A. (Utah Bank) and First Security Bank of Idaho, N.A. (Idaho Bank), are large, respected national banks, almost one hundred years old, controlled, supervised, and regularly examined by the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation (Pet. App. A 21). They are owned by the First Security Corporation (Holding Company), the oldest bank holding company in existence, the stock of which is publicly held by thousands of stockholders throughout the United States and in various foreign countries (Pet. App. A and B 19, 38).

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[1] All citations to the Internal Revenue Code, or Code, herein refer to the Internal Revenue Code of 1954 unless otherwise indicated.

Almost a quarter of a century ago the banks began to make available to their borrowers credit life, health and accident insurance, which pays off the debt in case the borrower dies or is incapacitated during the term of his loan. (Pet. App. B 39). The premiums charged were at the uniform rate of $1.00 per $100.00 of coverage per year on a decreasing term basis. That was the rate commonly charged in the industry and was accepted by the Insurance Commissioners of the states involved — Utah, Idaho and Texas (Pet. App. B 39).

The insurance was never more than an incidental part of the banks' primary transactions, the lending of money, and the customers were never required or urged to purchase it. Thus, during the years in issue less than half of the banks' installment loan customers and only 13% of their real estate loan customers took insurance (Pet. App. B 39). As a routine part of loan transactions, the bank loan officer (who was not a licensed insurance agent) explained the function and availability of such insurance. If the customer desired insurance, the loan officer gave him application forms for completion. Bank personnel examined the application, made out a certificate and either collected the premium from the customer or added it to his loan. The completed forms and premiums were transmitted at intervals to the management corporation for the banks, the First Security Company (Management Company), which performed certain bookkeeping functions such as making records of the insurance purchased, and then forwarded the premiums and related work to the insurance carrier (Pet. App. A and B 25-26, 39-40).

Explaining and processing the insurance took only one to two minutes of the loan officers' time on each loan, and the total annual cost to each bank for the time and expense of explaining and processing all of such insurance was less than $2,000.00. That expense was found by both courts below to be negligible. (Pet. App. A and B 25, 40, 49—For the five years in issue, the total cost was $8,929.30 for Utah Bank and $9,826.48 for Idaho Bank).[2]

The banks' articles of incorporation limit them to the business of banking (Pet. App. A 21). And, the national banking laws, 12 U.S.C. Sec. 92 prohibit the banks from engaging in the insurance business or receiving commissions from the sale of insurance. (Pet. App. A, B and D 29, 44-45, 55-56). As a result, the banks never received or attempted to receive any commissions at any time from the sale of the insurance in question. (Pet. App. A and B 29, 45).

From 1948 to April 1, 1954, the credit insurance coverage on the banks' borrowers was carried first by Credit Life Insurance Company of Springfield, Ohio, and later by American Bankers Life Assurance Company of Florida, both of which were independent of Holding Company and its subsidiaries. Commissions varying from 40% to 55% of net premiums were paid by those companies to Ed D. Smith & Sons which was an insurance agency wholly owned by Holding Company. (Pet. App. B 40).

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[2] As found by the Court of Appeals, the benefits received by the banks by way of added protection for the repayment of their loans (over $500,000 paid off during the years in suit, Pet. App. B 40) more than justified the negligible time and expense involved in making the insurance available. (Pet. App. B 49).

American National Insurance Company of Galveston, Texas (National), an independent insurance company, wrote a large volume of credit insurance. Foreseeing a change in the credit insurance business, National, late in 1953, approached Holding Company and other financial institutions with a plan whereby it would write credit insurance for the banks' borrowers. The plan called for Holding Company to create a life insurance subsidiary. The subsidiary's business would be to reinsure the risks of the credit insurance policies written by National for the customers of Utah Bank and Idaho Bank. Profits from the business, if any, could be retained in the subsidiary for investment. In its initial years, the subsidiary would utilize National's established and experienced operating services, such as actuarial and accounting, on a fee basis. If the plan proved successful, the new subsidiary could grow into a full-line direct-writing insurance company. (Pet. App. B 41).

Holding Company adopted National's plan and in June, 1954, incorporated First Security Life Insurance Company of Texas (Security Life), under the laws of the State of Texas. Security Life was a bona fide, viable business enterprise. (Pet. App. A and B 24-29, 41-42). The credit insurance written by National for the two banks was reinsured with Security Life under contracts called reinsurance treaties. Thereunder, National received approximately 15% of the premium dollar for its technical services and Security Life received the balance for its assumption of 100% of the risks under the policies. (Pet. App. B 41). Although Security Life's business proved successful, this result was not assured at the outset. In

relation to its capital structure, Security Life reinsured a large amount of risk, and several aspects of its business could have invited high mortality rates. (Pet. App. B 41-42). During the years in issue neither National nor Security Life paid any commissions.

The banks benefited from having available in their offices the forms and means whereby those applying for loans could also secure credit life insurance: it constituted an added attraction to customers, provided for repayment of insured loans in case of death, illness or disability, and improved public relations by eliminating demands for payment upon the families of deceased or incapacitated borrowers. (Pet. App. B 39). As a result of the additional collateral provided by such insurance, the banks had more than one-half million dollars in loans paid off during the years in issue. (Pet. App. B 40).

On September 15, 1959, as the result of a reorganization pursuant to the Bank Holding Company Act of 1956, 12 U.S.C., Sec. 1841 et. seq., the banks became owned by the First Security Corporation, and Security Life became owned by First Security Investment Company, another publicly held corporation. Under the plan of reorganization, the stock of First Security Investment Company was distributed originally to the shareholders of the First Security Corporation, but the stock was actively traded on the open market and by the end of 1959, 7.2% of the First Security Corporation stock had been sold and 8.9% of the Investment Company stock had been sold. As of February, 1967,

a differential of 48.4% existed in the shareholders of the two corporations. (Pet. App. B 42).

Notwithstanding the fact that for several years Security Life and the taxpayer banks had been owned by separate, publicly held corporation, the Commissioner, by notices of deficiency dated December 21, 1962, proposed to allocate to the banks approximately 47% (about $800,000.00) of Security Life's premium income (after payment of National's management fee) for the years 1954 through 1959. An alternative allocation was made to Management Company. (Pet. App. B 42). Thereafter, the banks and Management Company petitioned the United States Tax Court for a redetermination of that proposed deficiency and the consolidated cases were tried before the Hon. William M. Fay. In a brief opinion, Judge Fay upheld the Commissioner's allocation solely upon what he deemed to be the authority of *Local Finance Corporation v. Commissioner,* 48 T.C. 773 aff'd. 407 F.2d 629 (C.A. 7), certiorari denied, 396 U.S. 956. Judge Fay dissented in *Local Finance* after hearing the trial of this case (48 T.C. at 800), making it clear that he agreed with the taxpayer banks' position in this case.

On appeal, the United States Court of Appeals for the Tenth Circuit reversed Judge Fay's decision with respect to the petitioner banks and reversed and remanded the Management Company's case for further consideration.

The Court of Appeals held that under the particular facts of this case the Commissioner was in error in at-

tempting to allocate approximately $800,000.00 to banks which had never received or attempted to receive income from the sale of insurance, including the six-year period of time from 1948 to 1954 when Security Life was not even in existence, and which expended a "negligible" amount of time and expense in having the insurance available for their customers while benefiting from that availability by having more than $500,000 in loans paid off in five and one-half years.

ARGUMENT

The issue presented was correctly decided upon the particular circumstances of this case by the Court of Appeals. Cases under Section 482 of the Code are essentially factual in nature, and no conflict of law or question of statutory interpretation or application is involved in this case. Consequently, there is no basis and no necessity for further review by this Court.

This Court has denied petitions for certiorari in Section 482 cases 14 times,[3] and has never accepted a case

[3] *Likins-Foster Honolulu Corp. v. Commissioner*, 417 F.2d 285 (C.A. 10), certiorari denied, 397 U.S. 987; *Local Finance Corp. v. Commissioner*, 407 F.2d 629 *(A.C. 7)*, certiorari denied, 396 U.S. 956; *Charles Town, Inc. v. Commissioner*, 372 F.2d 415 (C.A. 4), certiorari denied, 389 U.S. 841; *South Texas Rice Warehouse Co. v. Commissioner*, 366 F.2d 890 (C.A. 5), certiorari denied, 386 U.S. 1016; *Oil Base Inc. v. Commissioner*, 362 F.2d 212 (C.A. 9), certiorari denied, 385 U.S. 928; *Pauline W. Ach, et al v. Commissioner*, 358 F.2d 342 (C.A. 6), certiorari denied, 385 U.S. 899; *Tennessee Life Ins. Co. v. Phinney*, 280 F.2d 38, (C.A. 5), certiorari denied, 364 U.S. 914; *Grenada Industries, Inc. v. Commissioner*, 202 F.2d 873 (C.A. 5), certiorari denied, 346 U.S. 819; *Central Cuba Sugar Co. v. Commissioner*, 198 F.2d 214 (C.A. 2), certiorari denied, 344 U.S. 874; *Advance Machinery Exch. v. Commissioner*, 196 F.2d 1006 (C.A. 2), certiorari denied, 344 U.S. 835; *Duncan v. Commissioner*, 173 F.2d 218 (C.A. 5), certiorari denied, 337 U.S. 957; *Hugh Smith, Inc. v. Commissioner*, 173 F.2d 224 (C.A. 6), certiorari denied, 337 U.S. 918; *National Securities Corp. v. Commissioner*, 137 F.2d 600 (C.A. 3), certiorari denied, 320 U.S. 794; *Asiatic Petroleum Co. v. Commissioner*, 79 F.2d 234 (C.A. 2), certiorari denied, 296 U.S. 645; rehearing denied, 296 U.S. 664.

arising under that statute for review. In each instance the petitions urged the involvement of important legal questions of general applicability in the administration of the statute, and many petitions cited conflicts. And, in each instance, the Commissioner opposed review by this Court, stating repeatedly that Section 482 basically presents only factual questions. In one of those cases, *Tennessee Life Insurance Co. v. Phinney*, 280 F.2d 38 (C.A. 5), certiorari denied, 364 U.S. 914, the Commissioner acknowledged a direct conflict.[4]

1. Section 482 authorizes the Commissioner to allocate income and deductions between commonly controlled business entities if he determines that such allocation is necessary in order to prevent "evasion of taxes or clearly to reflect the income" of any of such entities. This provision, which first appeared in its present form as Section 45 of the Revenue Act of 1928, was designed—

> " * * * to prevent evasion (by the shifting of profits, the making of fictitious sales, and other methods frequently adopted for the purpose of 'milking'), and in order clearly to reflect their true tax liability." H.Rep. No. 2, 70th Cong., p. 16 (1939-1, Pt.2 Cum.Bull. 395).

The *test* for determining whether an allocation is warranted under Sec. 482 is whether—

> " * * * the taxable income, in whole or in part, of a controlled taxpayer, is other than it would have been had *the taxpayer* in the conduct of *his* affairs been

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[4] Brief for the Respondent in Opposition (pp. 6, 7-13), *Tennessee Life Insurance Co., supra*, October Term, 1960, No. 482.

an uncontrolled taxpayer dealing at arm's length with a n o t h e r uncontrolled taxpayer." Regs. Sec. 1.482-1(c), (Pet. App. D 55). (Emphasis added).

That test has been universally adopted. See e.g., *Davis v. United States,* 282 F.2d 623, 626 (C.A. 10); *Commissioner v. Chelsea Products,* 197 F.2d 620, 623 (C.A. 3); *Oil Base, Inc. v. Commissioner,* 362 F.2d 212, 213-214 (C.A. 9). And, the test was specifically adopted and applied by the Court of Appeals in this case when it concluded that the banks' taxable income would not have been any different if they had dealt with unrelated, uncontrolled third parties rather than with Security Life through National. Of course that inquiry under the statute and regulations is essentially factual, and upon review by this Court it would not lead to the creation of a rule of general application or development of heretofore unknown facets of the tax laws.

Both courts below found that the banks ". . . *never* received or *attempted* to receive commissions or reinsurance premiums resulting from their customers' purchase of credit insurance." (Pet. App. A and B 29, 45). Conversely, as pointed out by the Court of Appeals (Pet. App. B 45), the lower court made no finding that if Security Life did not exist (and the banks were dealing strictly with an unrelated insurance company) that the banks would then receive or attempt to receive such income. As shown by the record, for six full years after the banks began making available the service of credit life, health and accident insurance to their customers — *prior* to the formation of Security Life — the banks dealt exclusively with unrelated insurance companies in an un-

controlled situation. Yet during that time the banks had no contact whatsoever with insurance commissions or profits resulting from their customers' purchase of credit insurance. (Pet. App. A and B 29, 45). The reason why this was and continues to be so is that federal banking law prohibits banks such as the taxpayers here from receiving compensation from the sale of insurance (12 U.S.C. Sec. 92, Pet. App. A, B and D 29, 44-45, 55-56). The penalty for violating that statutory prohibition includes loss of the organization's national banking franchise and personal liability against directors of the bank (12 U.S.C. Sec. 93, Pet. App. D 56-57).

There is no evidence or finding below that the banks would jeopardize their very charters and subject their directors to the risk of personal penalties[5] by violating national banking laws for a few dollars of insurance profit.[6] The evidence is to the contrary. (Pet. App. B 49-

[5] This is no closely held corporation situation where director-officer-owners stand to enrich themselves through corporate devices. These banks are publicly owned through Holding Company, and their directors are independent businessmen from many segments of industry.

[6] On pages 14-15 of his brief the Commissioner alludes to the federal banking laws in question but misinterprets their effect here by making an argument which suggests that the banks are placing in issue the supremacy of the federal tax laws. The Commissioner has missed the point. It is what the existence of the banking laws did to affect the entire structure of the transactions in question that is the point here. As the Court of Appeals found, *because* of the national banking laws, the banks remained aloof from any entitlement to insurance related income. (Pet. App. B 49-50). The Commissioner's reference to *James v. United States*, 366 U.S. 213 (Pet. 15) also misses the point. In *James*, the taxpayer in fact received income, although receipt was illegal. Here, the taxpayers not only did *not* receive any income, they consciously structured their affairs in good faith compliance with federal law so as to remain completely removed from and unrelated to it. In *James*, the taxpayer broke the law and took money for himself. Here, the Commissioner seeks to force the banks to break a law which they at all times have respected, in order to sustain a theoretical allocation of income which will never happen in real life.

50). Thus, the Commissioner's position in these cases is a perversion of what Congress intended Section 482 to achieve. The Court of Appeals recognized that he is using a so-called "controlled" situation to attribute to the banks income which both courts below determined that they would never receive in an uncontrolled situation, resulting in the fiction of attributing hundreds of thousands of dollars to banks *which will never receive that money, and a tax where there is no possibility of income.* (Pet. App. B 50).[7]

The decision of the Court of Appeals in this case accords with the weight of authority that the Commissioner cannot force a taxpayer to violate a law which that taxpayer is in good faith attempting to respect, and that good faith efforts by the taxpayer to comply with the law must be recognized and sustained. *Nichols Loan Corp. v. Commissioner,* T.C. Memo. 1962-149 (21 T.C.M. 805), rev'd on other grounds, 321 F.2d 905 (C.A. 7); *First State Bank v. United States,* (D.C.S.D., decided June 25, 1962), unofficially reported at 62-2 U.S.T.C. Par. 9613; *Campbell County State Bank, Inc. v. Commissioner,*

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[7] The Commissioner's comments in footnote 10, p. 14 of the petition are not responsive to the test required under Section 482. The Commissioner refers to Holding Company's power to designate where the insurance income would go. However, the power to place another person in a position to perform profitable functions has never before been considered the touchstone of taxability. *Crowley v. Commissioner*, 34 T.C. 333 (1960); *Alabama-Georgia Syrup Co. v. Commissioner*, 36 T.C. 747 (1961); *rev'd. on other grounds sub. nom, Whitfield v. Commissioner*, 311 F.2d 640 (C.A. 5); *Nat Harrison Associates, Inc. v. Commissioner*, 42 T.C. 601 (1964). Moreover, it is not the power which may be possessed by Holding Company which controls in this case. Under the test proposed by the regulations under Section 482, *supra*, p. 8, the only relevant consideration is whether the income of the *banks* would be any different if Security Life did not exist or, for that matter, if the banks stood entirely alone, unrelated to any other corporation or controlling individual whatsoever.

37 T.C. 430, 438-443 (1961), rev'd on other grounds, 331 F.2d 374 (C.A. 8); *First Security Bank v. United States*, 213 F.Supp. 362 (D.C. Mont. 1963), aff'd 334 F.2d 120 (C.A. 9); *L. E. Shunk Latex Products, Inc. v. Commissioner*, 18 T.C. 940, 959-961 (1952); *Ray Waits Motors v. United States*, 145 F.Supp. 269 (E.D.S.Car. 1956). See also *Jaeger Motor Car Co. v. Commissioner*, T.C. Memo. 1958-223 (17 T.C.M. 1098), aff'd, 284 F.2d 127 (C.A. 7), certiorari denied, 365 U.S. 860, where the Commissioner, contrary to his present position, was arguing that it would be against the law for the corporation to receive the income in question, and the court agreed.

2. The Commissioner briefly asserts a conflict of circuits (Pet. 7-8), *but does not point out in what respect the two circuits disagree on the interpretations of either of the two statutory provisions involved.* He seeks on general terms to establish a conflict by saying such fact was recognized by the Court of Appeals for the Tenth Circuit. But the language from the opinion of that court refutes the Commissioner and shows only that the Tenth Circuit, as well as the Tax Court, recognized that the fact situations in the two cases were similar. Mere similarity of fact situations, however, does not necessarily give rise to a conflict in the interpretation of legal principles of the kind that it is necessary for this Court to resolve. Courts, as juries, will continue to draw different conclusions from similar factual patterns, despite a decision in a particular case by a higher court that it agrees with one rather than the other interpretation of the facts.

The Tenth and Seventh Circuits have not disagreed

concerning the applicable legal test. Both have accepted and applied the same standard; and nothing in either opinion suggests a different legal analysis of the applicable statutes. The Commissioner went to the heart of the matter in his brief in opposition to the petition for certiorari in *Local Finance* when he told this Court that cases such as this do not present "difficult and fundamental issues in federal tax law" since they involve "essentially factual" questions.[8] Consequently, if the Court grants certiorari it would be only to decide which of the appellate courts took the correct view of fact patterns which have similarities, (but which also have dissimilarities).

The Commissioner's bare, unamplified conclusions (Pet. 11-12) that the Tenth Circuit's opinion will "impair" the "effectiveness" of Section 482, and that it goes to the "meaning and scope" of the statute, are unsupported by any explanation of why that is so, or any showing that the Court of Appeals used an erroneous test for applying Section 482, or a test different from that used by the Seventh Circuit. The fact is that the Tenth Circuit recognized and applied the precise test set forth in the Commissioner's regulations (Reg. Secs. 1.482-1(b) and (c)—Pet. App. B 43-44), and made the resulting fact finding that, under such test, the statute would not apply since the banks' income would not have been any different if Security Life did not exist, and no matter with whom the banks might have been dealing. This was so because of the undisputed evidence that the banks were unwilling to

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[8] Brief for the Respondent in Opposition, p. 15, October Term, 1969, No. 561.

violate national banking laws under any circumstances. The Commissioner reveals his erroneous concept of this crucial point where he attempts to clinch his statements just referred to by asserting incorrectly and contrary to the record (Pet. 13) that the banks' income was less than it would have been under different circumstances. In short, the Commissioner is not really proposing review of a legal principle by this Court, he is seeking another opinion on the facts.

The Commissioner also erred in his statement (Pet. 8) that only one factual difference exists between this case and *Local Finance*. Certain critical differences do exist.

First, in *Local*, there was a finding that the commissions in question *would* have been paid to the finance companies but for the existence of a controlled entity. The Seventh Circuit emphasized that difference as a controlling feature which distinguished *Local* from similar cases involving insurance commissions (407 F.2d at 634). The findings in this case are exactly opposite (Pet. App. B 45, 49-50). All the evidence indicates that the banks would not violate national banking laws (with the consequent severe penalties) under any circumstances.

Second, the Seventh Circuit in *Local* distinguished that case from *Campbell County State Bank, Inc. v. Commissioner, supra,* on the additional ground that in *Campbell* there was a specific finding that "the services performed by the Bank in connection with the insurance were minimal." (407 F.2d at 634). In this case, like *Campbell,* there was a specific finding by the courts below that the banks'

expenses (hence, services performed) in connection with the insurance were "negligible" (Pet. App. A and B 25, 40, 49)[9]

Third, the Tax Court, in *Local,* stressed that "there is no showing that" the amount which the related life insurance company was allowed to retain under the Commissioner's allocation "is not adequate compensation for the reinsurance." (48 T.C. at 792). To the contrary, the record in this case establishes that Security Life earned and needed every cent it received due to the size and nature of the risks it assumed and the fact that several aspects of its business could have invited high mortality rates. (Pet. App. B 41-42).

Fourth, the finance company employees in *Local* were licensed insurance agents; whereas, the bank personnel were not insurance agents (which may account for the fact that almost all of the borrowers in *Local* took insurance, while most of the bank customers did not). (48 T.C. at 779; Pet. App. B 39).

Even assuming arguendo, that a conflict exists between *Local Finance* and this case on the Commissioner's

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[9] It is significant that the banks in this case spent far less time and effort in connection with the insurance than did the finance companies in *Local.* Over the five years involved in suit here, Security Life collected $1,916,241 in net premiums—over one-third *more* than was collected in *Local* (48 T.C. at 784), and yet the finance companies in *Local* spent more than three times as much in handling less insurance over a four-year period than the banks here did in handling more insurance over a six-year period. Moreover, in *Local* as many as 95% of the customers of the finance companies purchased credit insurance (48 T.C. at 776), but less than one-half of the banks' installment loan customers and less than 13% of the banks' real estate customers purchased insurance. (Pet. App. B 39).

limited theory, totally undeveloped in his petition, that lending institutions should be taxed whenever their activities amount to the *"sine qua non"* (whatever that may be) of the insurance business (Pet. p.8, n.8), there is still no compelling legal question for this Court to review. Indeed, *the Commissioner does not ask for review on the point.*

(a) Such a question does not lead to anything new or unique in the law for this Court to decide. Any rule announced on the point could not possibly result in a conclusion more definitive than that each case should be judged upon its own facts. For instance, what if the related insurance company had its own personnel at separate desks in each bank, and *they* (not bank personnel) explained and processed the insurance. Where are the *"sine qua non"* services in that situation?[10] What about situations where corporations make medical (such as Blue Cross, Blue Shield) and other insurance services available to their employees. Would that be a *"sine qua non"* activity resulting in insurance income being attributed to the corporation by the Commissioner? And, what of the many varied facts situations already decided by the courts in the cases cited *infra*, p.1[illegible]? One of the writers of this brief,

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[10] In this case, the availability of insurance had its own built-in benefits to the banks unrelated to any income from insurance premiums. George Eccles, President of the banks, testified that credit life, health and accident insurance on borrowers was beneficial to the banks as security for their loans. No truer statement was ever made. During the years in suit such insurance paid off more than $500,000.00 in bank loans on death claims alone, against a processing cost of only $2,000.00 per year per bank. As the Seventh Circuit stated in *Nichols Loan Corp. v. Commissioner, supra*, 321 F.2d at 907: "This Court should be slow to override the business judgment of petitioners that lending their facilities to the credit insurance business was beneficial."

Stephen Anderson, tried one of those cases, *Bank of Kimball v. United States*, 200 F.Supp. 688 (S.D. 1962), for the Government—resulting in the only win for the Government on an insurance related case until *Local*. (See Judge Fay's comment to that effect in his dissent in *Local*, (48 T.C. at 808). The Commissioner's "*sine qua non*" theory was not suggested by the government in that case. And, this Court will note from a review of the facts of the case that such a theory would not have strengthened the government's position or changed the result one iota.

It is important in this context to observe that because of the many different fact patterns involved in these types of cases, the issue here does not have overriding and special significance for the insurance or lending industries. The Commissioner's brief in opposition to certiorari in *Local Finance* underscores that point, and refutes his suggestions to the contrary here. (Pet. 10-11).

(b) The arguments advanced by the Commissioner in opposition to a petition for certiorari in *Tennessee Life Ins. Co. v. Phinney, supra,* where an admitted conflict existed, apply with equal force here. The Commissioner argued in that case that "though the question is important, the nature of the conflict is not such as to require resolution by this Court," principally because the case in conflict was an "isolated decision" and the case before the Court was "in accord with the weight of authority."[11] Likewise, with the sole exception of *Local Finance*, courts have repeatedly rebuffed the Commissioner's efforts to levy a

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[11] Brief for the Respondent in Opposition, pp. 8-9, October Term, 1960, No. 482.

tax in situations indistinguishable in principle to the one here, and have refused to recognize the Commissioner's proposition that any efforts which "generate" income must result in the inclusion of the amount thereof in the gross income of the person or entity responsible for that effort. *Teschner v. Commissioner*, 38 T.C. 1003, 1007, 1009; *Basye v. United States*, 295 F.Supp. 1289, 1292-1295 (N.D. Calif.); *Ray Waits Motors, Inc. v. United States, supra; Moke Epstein, Inc. v. Commissioner*, 29 T.C. 1005 (1958); *Gaddy Motor Company, Inc. v. Commissioner*, T.C. Memo. 1958-189 (17 T.C.M. 944); *Jaeger Motor Car Co. v. Commissioner, supra; Campbell County Bank, Inc. v. Commissioner, supra; Bank of Kimball v. United States, supra; Paramount Finance Co. v. United States*, 304 F.2d 460 (Ct. Cl. 1962); *Nichols Loan Corp. v. Commissioner, supra; First Security Bank v. United States, supra; First State Bank v. United States, supra.*

See also, *Seieroe and Gerber*, "Section 482 — Still Growing at the Age of 50," 46 Taxes 893, 900-902 (Dec. 1968.

The so-called "generation" of income argument of the Commissioner was described by the Tax Court as being "* * * completely at variance with every accepted concept of Federal income taxation * * * ." *Teschner v. Commissioner, supra*, 38 T.C. at 1007.

All of those previous decisions, plus many others, have settled the trend of this area of the law, and this, plus the factual nature of the issue, is the complete answer to the Commissioner's statement (Pet. 10-11) that

other cases will arise in this context. *Local*, not this case, was the aberration from the rule (uniformly adverse to the Commissioner) and the Commissioner represented to this Court in that case that the matter did not present any questions sufficiently important for review.

(c) Additionally, the importance of cases of all sorts involving insurance companies diminishes rapidly for years after 1959 since, as pointed out by the Tax Court (Pet. App. A 23), the Life Insurance Company Income Tax Act of 1959 in large part eliminated the tax savings on income to insurance companies. Respondent's arguments, (Pet., notes 4 and 5, pp. 8-9, and p. 10), that preferential treatment of life insurance companies still exists under the law. (Secs. 801-820 of the Code), are incomplete. The only tax advantage enjoyed by life insurance companies since 1959 is a deferral of taxes on that portion of the company's income which goes into certain reserves up to a stated limit. After that limit is reached, the entire income of the insurance company is taxed as any other corporation. And, whenever the money in the favored reserves is paid out, a full corporate tax is paid at that time. Hence, the effect of the 1959 Act is to cause every dollar of net income to insurance companies to be subject to an eventual full corporate tax.[12]

3. The bulk of the Commissioner's petition (pp. 8-15) is devoted to representations of alleged administrative

[12] The Commissioner's attempt to avoid that fact by arguing, Pet. 8-9, notes 4 and 5, and p. 10, that cases still exist for years subsequent to 1959, is misleading. Proposed allocations by the Commissioner reveal nothing whatsoever as to what total taxes are or may be due from the related insurance company absent the proposed allocation. Allocations relate to *who* may be paying the tax, not *how much*, on a comparative basis, will eventually be paid.

importance of this case, suggesting that: it controls $67 million in taxes in 22 groups of other cases (Pet. 10); it contains issues of national impact upon Government officials and private counsel (Pet. 11); and that it raises important questions of law (Pet. 11-15).

Every one of the fourteen previous petitions for certiorari in Section 482 cases[13] (involving every kind of complicated interpretation and application of that statute) have alleged similar considerations, only to be uniformly opposed by the Commissioner on the ground that questions under the statute are "essentially factual." However, the complete answer to the Commissioner's present assertions and expressions of concern is found in the briefs to this Court in *Local Finance*. In that case, which the Commissioner claims involves the identical issues which are present here (Pet. 7-8), the taxpayer's petition for a writ of certiorari advanced the same arguments as are now urged by the Commissioner: administrative importance; controlling effect upon 1,399 cases pending in lower courts involving the allocation of $232,470,659.00 of income; fundamental and important questions of law, and so forth. In his reply, the Commissioner denied all of those arguments and solemnly declared to this Court that the case and issues involved did not merit review, saying:[14]

> "In any event, measurement of the administrative importance ends, as it begins, not with petitioners'

[13] Note 3, *supra*.

[14] Brief for the Respondent in Opposition, p. 15, October Term, 1969, No. 561.

assertion (Pet. 22) that this case raises 'some of the most difficult and fundamental issues in federal tax law,' *but rather with recognition that an essentially factual question is presented. Further review by this Court consequently is unwarranted.*" (Emphasis added.)

We adopt that representation by the Commissioner. As we have pointed out throughout this brief, there is simply no way of knowing what different sets of facts will control the pending cases referred to by the respondent. (Pet. 10).[15] And, also as pointed out above, the legal questions are not new. The insurance arrangements here are simply variations on a theme already passed upon numerous times by various courts (see the cases cited *supra*, p. 19), in situations invariably controlled by the facts of the particular case. As Judge Fay of the Tax Court stated in his dissent (48 T.C. at 808):

> "It is particularly noteworthy in this context to consider the past history of respondent's attempts to attack various business-connected insurance arrangements. Respondent has pitched his arguments on Sec. 61, 269, 482, and a general argument that income was properly taxable to a lending institution rather than a controlled reinsurer or the shareholders of the lending institution as p a r t n e r s of an insurance agency. *All these approaches have been repeatedly rejected by this and other courts.*" (Emphasis added).

Lastly, the Commissioner's reliance upon the excerpt from H. Rep. No. 1098, 84th Cong., 1st Sess., p. 7 (Pet.

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[15] This also applies to the Commissioner's assertion, Pet. 10, outside of the record, that he has been settling cases on the basis of *Local*.

9), does not correctly interpret the report in question which in context directly supports the bank's position here.[16] The quoted statement refers to some exceptional abuse situations where a subsidiary was caused to charge excessive premiums, which in turn, were paid by the parent as a way to shift the parent's income to the subsidiary. The quotation in the Commissioner's brief reveals that fact itself where it states: "If the subsidiary charges *excessive premiums* . . . ." (Emphasis added). On page 46 of those comments by the Subcommittee, and page 48 of the report of the Committee, the problem is identified as one where a *lender pays* "excessively large net premiums to avoid taxation to itself." The report goes on to state, in a part not quoted by the Commissioner that:

> "It is pointed out that the difficulty is that the prescription of some sort of standards is necessary. It is suggested that one test would be the fact of a premium charge *higher* than the *going rate* for the *type of insurance purchased.*" (Emphasis added).

It is undisputed in this case that the banks were not charging excessive premiums. They were not charging any premiums at all. And, the premiums which were charged by National were the "going rate," as specifically found by both courts below. (Pet. App. A and B 26, 39). In his proposed findings to the Tax Court, the Commissioner admitted in his own brief that:

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[16] The Commissioner's analysis (Pet. 9-10, n.6) of the Committee's intended meaning with respect to the cited report, does not find any support in the language of the report itself. The "excessive premium" referred to in the report was specifically defined as "a premium charge *higher* than the *going rate* for the type of insurance purchased." (Emphasis added).

"4. From 1948 through 1959, the Banks had available for their borrowers, credit life, health and accident insurance, at the *prevailing* and *competitive* rate of $1.00 per hundred or its equivalent . . . ." (Emphasis added).

Thus, the situation considered by the House of Representatives is altogether different from the present situation. And, far from helping the Commissioner, those excerpts from the legislative history of the Life Insurance Company Tax Act of 1955 disclose Congressional opinion that Section 482 would *not* apply to the facts present here. No *lender* paid premiums in this case and the premiums (which were paid by borrowers) were *not* excessive; they were the going, prevailing and competitive rate.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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August, 1971.

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CERTIFICATE OF SERVICE

I, STEPHEN H. ANDERSON, hereby certify that five copies of the foregoing Brief for the Respondents, First Security Bank of Utah, N.A., et al, were air mailed by me by depositing the same in a United States Post Office, postage prepaid, pursuant to paragraph 2, Rule 33 of the Rules of the Supreme Court of the United States, to ERWIN N. GRISWOLD, Solicitor General, Department of Justice, Washington, D.C. 20530, this ....20.. day of August, 1971.

Stephen H Anderson

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